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BRIEF FOR RESPONDENT IN OPPOSITION

[redacted]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 100

PHILLIPS PETROLEUM COMPANY,
Petitioner,

vs.

SHELL OIL COMPANY, INCORPORATED,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the District Court of the United States for the Southern District of Texas, appearing in Vol. I of the Record at page 86, is not reported. The opinion of the Court of Appeals for the Fifth Circuit was reported in 166 F. (2d) 384 and will also be found beginning at page 1265 of the Record. The Order denying a rehearing, appearing at page 1285 of the Record, is not reported.

Jurisdiction

The jurisdiction of this Court is invoked by petitioner under Section 240(a) of the Judicial Code, 28 USCA 347, as amended by the statutes of February 13, 1925 and Section 274(d) of the Judicial Code, 28 USCA 400.

Summary and Short Statement of the Matter Involved

The Petition, in its statement of matters involved, omits the essential facts upon which the decisions of the trial court and of the Court of Appeals were based. The Brief proceeds on premises of fact contrary to the concurrent findings of the courts below. The Reasons relied upon for the grant of a writ are wholly unfounded in the record, and the arguments presented are irrelevant to any of the actual facts of the case.

Despite the fact that this is an ordinary patent infringement suit, the petition contains no reference either to the patent disclosure (except for a footnote quoting the claim in suit) or to the alleged infringing operations. These deliberate omissions are understandable and significant when the facts are supplied.

1. The patent in suit discloses a thermal process which depends upon *high temperature and high pressure.* It states (R. 910, col. 2, line 6):

> "The process consists in subjecting a paraffin hydrocarbon such as butane or propane to a temperature at which decomposition will take place but very slowly (400-500°C.) and under a pressure of 1000 pounds per square inch or more . . ."

400-500°C. means a temperature of 752-932°F.

2. In respondent's operations the paraffins are *refrigerated* to a temperature of 40-60°F. (5-15°C.) and maintained at a low pressure of 50 to 75 pounds per square inch, just enough to keep the hydrocarbons in liquid phase. The alkylation reaction is caused entirely by agitation with large volumes of concentrated sulphuric acid acting as a catalyst (R. 805).

3. The respondent's catalytic reaction could not take place under the high temperature and high pressure con-

ditions prescribed in the patent (R. 810). The patented thermal process could not take place under the low temperature and low pressure conditions employed by respondent, for at such temperature there is no measurable decomposition of paraffins (R. 288).

4. The thermal process of the patent has been tried commercially but once and abandoned (R. 857-60). The respondent's catalytic process has been adopted and used on a tremendous scale (R. 687, 1020-2).

5. Frey, by his own admission, was not a pioneer in the art (R. 993). Paraffins had been alkylated by means of catalysts prior to his alleged invention, as the Court of Appeals pointed out (R. 1216). The "procedural steps" referred to in the claim were the common procedural steps of earlier processes for alkylating aromatic hydrocarbons (R. 1268) and the same procedural steps had been used before Frey in alkylating paraffins (R. 525-7).

6. There is no analogy between the situation presented here and that in *Goodyear* v. *Ray-O-Vac,* 321 U. S. 275, as is asserted in the Petition. In fact, the situation here is just the reverse of that in the *Goodyear* case. In the *Goodyear* case, the patentee had been found by both courts below to have been the first to solve a long standing problem in the art; and the defendant there was found to have "consciously copied" the patentee's device. In that case the Supreme Court refused to disturb the concurrent findings below. In the present case, on the contrary, both courts below found that Frey was not the first inventor of the process claimed and that the process of the respondent differed in kind from that of the patent and was not an infringement.

7. The Petition and Brief are hinged upon the premise that the Frey patent discloses a pioneer and revolutionary discovery. Both courts below found to the contrary. The concurrent findings of no invention (R. 87, 1269) and no

infringement (R. 88, 1269) are findings of fact[1] which this Court will not disturb if supported by any material evidence[2].

ARGUMENT

"Questions Presented" and "Reasons Relied Upon"

Of the questions presented, three and four do not need discussion and in fact are not discussed or argued in the Petition and Brief. We will limit our reply therefore to the questions presented in the three Points set forth in the Brief.

Petitioner's Point 1

The basic proposition set forth in this "point" is that the courts in this case, in passing on the questions of validity and infringement of the Frey patent, have departed from the principles of patent interpretation announced by the Supreme Court.

Since the argument admittedly "hinges" upon the "fact" that "The Frey patent discloses and claims this pioneer and revolutionary invention" (Pet. p. 15), and the courts below have concurred in finding that the patent discloses and claims *no* invention, the petition must necessarily fall.

Indeed, there is not one material assertion in the long paragraph in which petitioner seeks to support its argument (Pet. p. 15) that is not actually disproved by the record and the decisions below. Thus, Frey was not moving in the face of contrary belief, for others before him had

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[1] *United States* v. *Esnault Pelterie*, 299 U. S. 198, 205; *Concrete Appliances Co.* v. *Gomery*, 269 U. S. 177, 180; *Stilz* v. *United States*, 269 U. S. 144, 147; *Thomson Spot Welder Co.* v. *Ford Motor Co.*, 265 U. S. 445-446.

[2] *Goodyear Tire & Rubber Co.* v. *Ray-O-Vac*, 321 U. S. 275, 278; *Williams Manufacturing Co.* v. *United Shoe Machinery Corp.*, 316 U. S. 364, 367.

alkylated paraffins thermally, as Frey himself admitted (R. 993), and others before him had alkylated paraffins catalytically at low temperature and low pressure as respondent does it (R. 1266-7). Frey did not discover the "procedural conditions" in question, for the slow addition of small quantities of olefin referred to in the claim was the common tool of the art not only in the earlier alkylation of paraffins by Grosse & Ipatieff but also in the still earlier alkylation of aromatics (R. 1268), and Frey himself repeatedly asserted that the alkylation of paraffins and of aromatics were equivalent or at least parallel procedures (Patent in suit, R. 911, col. 1, line 46; R. 1196-7). Frey created nothing of importance to industry. The one plant that plaintiff put in operation in 1940 was suspended in 1942 (R. 857-8) and finally shut down in 1944 (R. 859-60). No one has ever taken a license under Frey's patent (Interrog. 7, I, 44 and Answer I, 52). Respondent's process, on the contrary, has been installed in 136 sulphuric acid alkylation reactors throughout the country (III, 1020-2) which at the close of the war were producing more than 4,000,000 gallons of alkylate daily (II, 687).

Petitioner's assertions under such circumstances that "Frey created an entirely new branch of an industry of major importance to the economy of this country and the general well being of its citizens" and that "The Frey patent discloses and claims this revolutionary invention" (Pet. p. 15) are so unrelated to the actualities of the case that the Petition, which admittedly "hinges" on those "facts", is an imposition and totally without merit.

The petitioner relies strongly upon the *Goodyear* case. However, the situation there was diametrically different. In that case, as pointed out at page 278 of 321 U. S., the District Court had made findings in favor of the plaintiff, which the Court of Appeals accepted, both as to the validity of the Anthony patent and as to its infringement. This Court said:

> "The Circuit Court of Appeals reexamined the findings in the light of the evidence and accepted

> them. It must be a strong case in which this court will set aside these concurrent findings of two courts."

Here, contrary to the quoted rule of that decision, the petitioner asks this Court (1) to set aside the concurrent decisions of the lower courts in favor of respondent, and (2) without any showing in its Petition of the alleged "invention" or "infringement" to undertake to find those facts of which the lower courts have denied the existence.

PETITIONER'S POINT 2

Petitioner's second point goes to the question of public interest in restricting the scope of patents. This point is answered in *Halliburton* v. *Walker,* 329 U. S. 1, 8-9, 12, where this Court found that it was not in the public interest to permit a patentee, by functional language of his claims, to block the road of others who find basically different methods of accomplishing the same result.

PETITIONER'S POINT 3

Here the petitioner argues that because it has other cases pending on the same patent, of which one is in another circuit, it is "a matter of judicial efficiency" for this Court to settle the question "finally" now by granting certiorari. This is a false issue, if there ever was one. The very existence of the pending case in another circuit is reason for denial of the petition. If that court disagrees with the court below, the resulting conflict between the circuits may afford ground for review which is now completely lacking. If that court agrees with the court below, even plaintiff may be convinced of the hollowness of its pretensions. In any event, the decision here cannot finally adjudicate the other cause. Admittedly the question of infringement would be at large (Pet. p. 24). And even as to validity that court and this Court might properly, on another record, reach a contrary result. *Smith* v. *Hall,* 301 U. S. 216, 218.

Conclusion

Since the Petition states no meritorious ground for the grant of the writ, it should be denied.

Respectfully submitted,

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